No. 80-1532

In the Supreme Court of the United States

OCTOBER TERM, 1980

BILLY JOE ENTREKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in permitting petitioner's former wife to testify about conversations she had with him concerning a kickback scheme in which both were participants, where petitioner had objected that her testimony about those conversations was barred by the privilege protecting confidential marital communications.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 624 F. 2d 597.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1980. A petition for rehearing was denied on October 24, 1980. The petition for a writ of certiorari was not filed until March 10, 1981, and is therefore substantially out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341; one count of conspiracy, in violation of 18

U.S.C. 371; and one count of making false statements before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to concurrent terms of one year's imprisonment on each count. Six months of each mail fraud term were suspended in favor of three years' probation. Petitioner was also fined $10,000 on both the perjury and conspiracy counts. The court of appeals affirmed (Pet. App. A1-A6).

The evidence at trial showed that in 1974 and 1975 petitioner was an at-large Commissioner of the LaFourche Basin Levee District in Louisiana. At a Levee District Board of Commissioners meeting on October 28, 1974, petitioner sponsored a resolution for the purchase of park land owned by Casa Linda, Inc. Petitioner had agreed to recommend the purchase in exchange for a $40,000 kickback from Casa Linda's owner, Peter Vicari. Vicari also arranged for "independent" appraisals of the property's value to be forwarded to the Board (Tr. 59, 76-77, 122-123, 129, 132, 272-277, 485, 489).[1]

Petitioner offered Ivy McDonald, another LaFourche Levee District Commissioner, $15,000 to co-sponsor the move to purchase the Casa Linda land. McDonald agreed, and the two men succeeded in getting the resolution of purchase approved, even though the property's price—$210,000—was three times what Casa Linda had paid for it only 11 months earlier (Tr. 61-71, 122-129, 139-140, 280, 346-377, 489).

Petitioner's former wife, Mattie Entrekin, testified over defense objections that several weeks prior to the purchase of the Casa Linda parcel, petitioner told her that Vicari owned the property and was going to give him a $40,000 kickback, part of which had to be shared with McDonald

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[1]We have been unable to locate the trial transcripts. The record references are taken from the brief filed by the United States in the court of appeals.

(Tr. 273-277). She testified that the day the kickback was paid, she helped petitioner count the money and later recorded the serial numbers of McDonald's share, after petitioner explained that he did not trust McDonald because he had arranged to be absent at the consummation of the sale and at the kickback payoff (Tr. 278-279).[2] She also testified that, a few days thereafter, petitioner took some of the kickback proceeds to McDonald (Tr. 287). Finally, Mattie Entrekin admitted that she and petitioner used kickback proceeds to purchase $22,000 worth of interest-bearing notes in their son's name (Tr. 289-290, 335).[3]

ARGUMENT

Petitioner contends (Pet. 14-24) that the district court erred in permitting his former wife to testify about conversations with him concerning the bribe scheme.[4].

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[2]Although petitioner had planned for McDonald to be present at the consummation of the purchase and at the kickback payoff, McDonald had gone fishing that day in the hope of minimizing his connection with the scheme (Tr. 138-140). McDonald, however, did eventually receive the $15,000 from petitioner (Tr. 141-145, 243-250, 280).

[3]Approximately three years after the kickback, at a time when the Entrekins were in the process of obtaining a divorce, Mattie Entrekin alerted FBI Agent Terry Scott about the Casa Linda scheme (Tr. 227, 233, 293). In the course of the ensuing investigation, petitioner was subpoenaed to appear before a federal grand jury. At his appearance before the grand jury, petitioner testified, *inter alia*, that he had not received any money in connection with the Casa Linda transaction, that he had no knowledge of McDonald's having received any money in that connection, and that he had never given McDonald any money except in payment of gambling debts. These responses were the basis of petitioner's conviction for making false statements to a grand jury.

[4]We note at the outset that the petition for a writ of certiorari was filed more than two-and-a-half months late. Since petitioner's claim of evidentiary privilege does not call into question the accuracy of the jury's determination of his guilt and does not appear to be one that could be raised in a collateral attack upon a final judgment of conviction (see *Davis* v. *United States*, 417 U.S. 333, 346 (1974)), petitioner should not be permitted to attack his otherwise final conviction by means of an untimely certiorari petition.

This claim was properly rejected by the court below, which concluded, as has the Seventh Circuit, the only other court of appeals to have reached the question, that the privilege barring evidentiary use of confidential communications between husband and wife does not extend to conversations about crimes in which the spouses are joint participants. See *United States* v. *Kahn*, 471 F. 2d 191, 194-195 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973) (cross-petition raising marital privilege issue), rev'd on other grounds, 415 U.S. 143 (1974); *United States* v. *Doughty*, 460 F. 2d 1360, 1363 (7th Cir. 1972); *United States* v. *Mendoza*, 574 F. 2d 1373, 1379-1381 (5th Cir.), cert. denied, 439 U.S. 988 (1978). See also *United States* v. *Trammel*, 583 F. 2d 1166, 1168-1170 (10th Cir. 1978), aff'd on other grounds, 445 U.S. 40 (1980).

Here, the evidence clearly established that Mattie Entrekin participated in the conspiracy with her then-husband. She helped petitioner count the kickback money; she prepared a list of the serial numbers of McDonald's share of the kickback as a hedge against the chance that he might try to "pin the rap" on them; and she participated in concealing their share by using kickback proceeds to buy securities in their son's name. Her involvement in the collection, distribution and concealment of the spoils was an integral part of the conspiracy. See *Pereira* v. *United States*, 347 U.S. 1, 8 (1954); *United States* v. *Knuckles*, 581 F. 2d 305, 313 (2d Cir.), cert. denied, 439 U.S. 986 (1978). Her actions, undertaken at petitioner's behest and for the couple's mutual illicit enrichment, precluded petitioner from invoking the marital privilege to bar her testimony about the scheme. See *United States* v. *Mendoza*, *supra*.

Contrary to petitioner's contentions (Pet. 15-18), *Trammel* v. *United States*, 445 U.S. 40 (1980), does not require a different result. In *Trammel* the Court held that the privilege against adverse spousal testimony is a privilege held

solely by the witness spouse, and it accordingly found that the adverse spousal testimony given in that case was properly admitted because Mrs. Trammel had agreed to testify against her husband. Given the facts in *Trammel* and the limits of its holding, petitioner's suggestion (Pet. 17-18) that *Trammel* "completely negates any view that the 'co-conspirator's exception' to the rule of marital privilege exists" is erroneous for two reasons.

First, while the Court acknowledged the existence of a privilege for confidential marital communciations that was distinct from the privilege against adverse spousal testimony, it had no occasion to consider the scope of the communications privilege because, as the Court noted, the district judge had excluded all confidential marital communications (445 U.S. at 43) and the privilege was thus not at issue in the case (*id.* at 45 n.5). Second, although the court of appeals had relied on a co-conspirator exception to the adverse spousal testimony privilege, and the government had advanced that as one of two independent grounds for holding that Mrs. Trammel's testimony was properly admitted, this Court had no occasion to reach the co-conspirator question because it accepted the government's first argument that the privilege belonged solely to the witness spouse.

This Court's reference in *Trammel* to a favorable description of the marital communications privilege as " 'the best solace of human existence' " (445 U.S. at 51, quoting *Stein* v. *Bowman*, 38 U.S. (13 Pet.) 209, 223 (1839)), adds nothing to petitioner's argument. As the Court had noted earlier (445 U.S. at 45), the marital communications privilege is modeled on, *inter alia*, the attorney-client privilege. The value of the latter privilege, too, has been generally acknowledged, but this Court has nonetheless recognized an exception for attorney-client communications in furtherance of criminal activity. As the Court observed in *Clark*

v. *United States,* 289 U.S. 1, 15 (1933), the attorney-client privilege "takes flight if the relation is abused." The court of appeals in this case, consistent with that principle, held in effect that the marital communications privilege takes flight where, as here, a man communicates information about his criminal activity in the process of enlisting his spouse as an accomplice in the crime.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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